No. 93-1198

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: TIME WARNER INC.
SECURITIES LITIGATION.

STEVEN J. ROSS, N.J. NICHOLAS, JR.,
GERALD M. LEVIN, BERT W. WASSERMAN,
and TIME WARNER INC.,

Petitioners,

vs.

ZVI TRADING CORP. EMPLOYEES'
MONEY PURCHASE PENSION PLAN AND TRUST
and BARRY ZONON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the court below, which found plaintiffs to have pleaded actionable omissions of material information by defendants under the federal securities laws, properly found it not "beyond doubt" under Conley v. Gibson, 355 U.S. 41 (1957), that plaintiffs also could establish defendants' motive to delay disclosure of that information?

II. Whether, for purposes of demonstrating defendants' scienter on a motion to dismiss under Rule 12(b)(6), the efficient market doctrine adopted in Basic, Inc. v. Levinson, 485 U.S. 224 (1988), does not preclude a finding that defendants' could have believed it to be to their economic advantage to delay disclosure of a coercive rights offering?

III. Whether review by this Court is entirely premature and unnecessary since the court below has invited the district court to consider allowing plaintiffs to amend the complaint to allege facts demonstrating conscious or reckless behavior by defendants?

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STATEMENT OF THE CASE

Respondents respectfully submit this brief in opposition to the petition of Time Warner Inc. ("Time Warner" or the "company"), and certain of its senior executive officers (together with Time Warner, "petitioners" or "defendants"), for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

A. Background Facts

Following the January 1990 merger of Time, Inc. and Warner Communications, Inc. to form Time Warner, Inc., Time Warner management considered a variety of ways to reduce the approximately $16.8 billion in debt and preferred stock brought about by the merger. In November 1990, Merrill Lynch Capital

Markets made a presentation to Time Warner executives concerning a possible restructuring (Pet. 34a n.7).[1] A rights offering was a featured component of that presentation. Rights offerings generally provide shareholders with the right to acquire shares at less than current stock market prices. Because such offerings are dilutive and make capital demands on shareholders, they are viewed negatively in the marketplace.

At about the same time, Time Warner decided to pursue so-called strategic partners: prospective business combinations meant to infuse billions of dollars of outside capital into the company. The

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[1] References to the petition are in this form.

capital was to be used to reduce Time Warner's debt and alleviate the impending problems associated with debt repayment obligations. Because strategic alliances indicated that there were outside sources of capital available to Time Warner to pay off its debt, this technique, unlike a rights offering aimed at existing shareholders, was viewed positively by the market.

As the Second Circuit observed, defendants "publicly hyped" their search for strategic alliances through all the formal and informal means available to a publicly traded company (Pet. 24a n.3). In press releases, SEC filings, and other public disseminations, defendants repeatedly proclaimed the advantages to Time Warner from strategic

alliances and further created the clear impression that these alliances were imminent. However, there was no public reference to defendants' contemporaneous consideration of a rights offering and other efforts to raise capital prior to June 6, 1991.

Petitioners' statements concerning strategic alliances clearly stimulated the marketplace. During the class period, the price of Time Warner's common shares surged about 40% from $86 per share on December 12, 1990, to $119 per share on June 3, 1991 (three days before defendants' disclosure of a rights offering, as discussed below), and outperformed the Standard & Poor's 400 index, the Standard & Poor's entertainment index, and the Standard & Poor's publishing index.

In fact, the actual progress and status of Time Warner's search for strategic partners did not justify defendants' public optimism. The undisclosed reality was that Time Warner's negotiations with potential third-party investors were proceeding unsatisfactorily. The company's debt prevented Time Warner from consummating a transaction on favorable terms because prospective investors perceived that the pressure from the company's maturing obligations would force management to accede to less advantageous financial provisions.

Because Time Warner had been unable to achieve a strategic alliance, defendants began actively considering other means of raising equity capital. In briefs filed in

the district court, defendants admitted that as early as "the end of April 1991," an affirmative proposal to implement a rights offering plan had been made by at least one of the company's investment advisors, and that by May 1, 1991, Time Warner was "consider[ing]" a rights offering as an alternative means of raising equity capital to alleviate the company's indebtedness.

However, although it was actively considered at least by the beginning of May, defendants withheld disclosure of the rights offering plan until June 6, 1991. On that date, defendants announced a unique and complex variable-price rights offering pursuant to which existing shareholders would be issued rights to purchase approximately 34.5

million shares of newly issued Time Warner stock. If 100% of the rights were exercised, each holder would receive one share of common stock for each right at an effective purchase price of $105 per share for a total of $3.5 billion. The 34.5 million shares would be placed in a pool to be distributed in full to those who exercised their rights, subject to the requirement that 60% of all the subscription rights were validly exercised. In effect, the offering was structured to coerce existing shareholders to exercise 100% of the rights in order to avoid significant dilution of their stock.

Following public announcement of the offering, Time Warner shares declined from $110.75 per share on June 5, 1991, to $99.50 on June 6,

1991. On June 7, 1991, the company's stock lost an additional $4.875 per share to close at $94.625 per share. In less than a week, Time Warner shares lost nearly 20% of their market value.[2]

The adverse market reaction reflected surprise and dismay that defendants were proposing a coercive rights offering that was never previously even hinted at as a means of reducing the company's outstanding debt burden, combined with uncertainty as to the price that Time Warner would actually receive per share. It also reflected Time Warner's acknowledgement that

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[2] The company's registration statement for the rights offering acknowledged the failure of the strategic alliance plan, when it reported that the rights offering was necessary to "enhance the company's ability to effect [alliances] in a more expeditious and favorable manner."

strategic alliances could not be accomplished without a significant infusion of equity capital.

After five weeks of controversy and the Securities Exchange Commission's ("SEC") refusal to approve the coercive rights offering, defendants abandoned the original plan and substituted a conventional fixed-price offering, which was completed in early August. Under the new plan, the company sold 34.5 million shares for $2.8 billion by offering shareholders rights at $80 per share, nearly $40 below the company's per share prices in early June, 1991. Thus, the company received $700,000,000 less than would have been obtained through the

original variable price rights plan for the same number of shares.[3]

B. The Decision of the Court of Appeals

The Second Circuit reversed the district court's dismissal under Rule 12(b)(6) of counts I and II of the complaint but affirmed the order of dismissal of count III.[4] The court of appeals remanded the matter for further proceedings consistent with its opinion.

To the extent that it reversed, the court of appeals

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[3] It was not until a year later, in June, 1992, and only after abating the pressure of its debt by raising $2.8 billion through the rights offering, that the company first consummated a strategic alliance with Toshiba Corp. and C. Itoh & Co., which raised approximately $1 billion.

[4] Count I alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder. Counts II and III pleaded common law fraud and negligent misrepresentation.

applied the well-settled standard established by this Court in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), for assessing the sufficiency of a complaint on a motion do dismiss; that is, the court was not satisfied "beyond doubt" that respondents could "prove no facts in support of [their] claim which would entitle [them] to relief." The Second Circuit's decision turned on narrow grounds involving questions of fact that could not be resolved on a motion under Rule 12(b)(6). As the court stated on the issue of nondisclosure:

> Whether consideration of the alternate approach [rights offering] constitutes material information, and whether nondisclosure of the alternate approach renders the original disclosure [strategic alliances] misleading, remain questions for the trier of fact, and may be resolved by summary judgment

> when there is no disputed issue of material fact. We conclude here only that the allegations in the complaint of nondisclosure of the rights offering are sufficient to survive a motion to dismiss.

(Pet. 29a) (emphasis added). Defendants are not asking this Court to review this aspect of the decision of the court of appeals.

In reversing the district court's dismissal for failure to plead scienter adequately, the Second Circuit also applied well-settled law. First, the court properly recognized that scienter may be established in either of two ways; that is, by showing motive and opportunity or conscious or reckless behavior.

The Second Circuit correctly understood that respondents were

posing two motive and opportunity theories:

> defendants were motivated to misrepresent the status of the strategic alliance negotiations to avoid jeopardizing talks with prospective partners, and to withhold disclosure of consideration of the rights offering to maintain a high stock price prior to announcement of the new rights offering in order to lessen the dilutive effect.

(Pet. 30a). The court then correctly held that:

> it is not clear, at least at this threshold stage of the lawsuit, that the defendants had nothing to gain by playing up strategic alliances while simultaneously keeping secret until the last moment the alleged active consideration of a rights offering.

(Pet. 31a). The court then properly deferred to the trier of fact the question of whether defendants believed nondisclosure of the

coercive rights offering would allow for a higher exercise price (Pet. 31a-32a).

The Second Circuit also held that plaintiffs could plead scienter by alleging facts showing defendants' conscious behavior in not disclosing their pursuit of alternative equity-raising vehicles such as the rights offering plan. In particular, plaintiffs had submitted to the court documentary and testimonial evidence -- obtained after the complaint was filed -- that defendants had been advised of a rights offering proposal in early November 1990, and had been actively exploring a rights offering plan and other forms of equity financing for weeks prior to the June 6, 1991 announcement. However, the court deferred to the trial court the

questions of whether plaintiffs may incorporate the foregoing evidentiary material into an amended pleading and whether that material sufficiently alleges defendants' conscious behavior (Pet. 34a-35a).

REASONS FOR DENYING THE PETITION

The instant petition does not satisfy the standards for accepting plenary review. Rule 10 of this Court's Rules provides in pertinent part that certiorari shall be granted "only when there are special and important reasons therefor" -- for example, when a decision of a court of appeals is in conflict with a decision of this Court or another court of appeals, or when a court of appeals has decided an important question of federal law which has not been, but should be, settled by this

Court. None of these circumstances exist in this case.

In arguing that the decision below created a split among the circuits and accepted "irrational" allegations of scienter contrary to the efficient market hypothesis this Court embraced in Basic, Inc. v. Levinson, 485 U.S. 224 (1988), both the petitioners and the dissent below misapprehend or ignore plaintiffs' motive allegations, misapply well-settled law, and fail to acknowledge the procedural posture of this case. Nor does the decision below undercut the efficient market theory or create a split among the circuits on any issue. Indeed, the motive theory accepted by the Second Circuit explicitly recognizes that material

information is efficiently impounded by the securities markets.

As discussed below, defendants withheld disclosure of their active consideration of the coercive rights offering prior to filing the registration statement to conceal from the market the fact that Time Warner could not raise new capital through strategic alliances. As the Second Circuit observed (Pet. 32a), in this way, Time Warner was able to attempt a rights offering at a price of $105, well in excess of the price the company's stock would have been trading at if there had been prior disclosure of defendants' consideration of the rights offering. Thus, the Second Circuit properly recognized that defendants may have perceived an economic advantage "by

playing up strategic alliances while simultaneously keeping secret until the last moment the alleged active consideration of a rights offering" (Pet. 31a).

Moreover, review would be especially inappropriate at this threshold stage of the case since, as the Second Circuit observed, plaintiffs have offered to amend their complaint to allege an alternative scienter theory of conscious or reckless behavior by defendants, and "this amendment may well be adequate" (Pet. 34a). Thus, this Court's intervention at this point would be entirely premature.

ARGUMENT

I.

THE DECISION BELOW IS IN ACCORD WITH THE WELL-SETTLED STANDARDS FOR PLEADING SCIENTER IN 10b-5 ACTIONS AND IS CONSISTENT WITH THE EFFICIENT MARKET THEORY UNDERLYING THIS COURT'S DECISION IN BASIC, INC. V. LEVINSON

A. The Court Below Correctly Applied The Standards For Pleading Scienter

At the outset, it is important to recognize the procedural posture of this case. The issue before the court below simply was whether plaintiffs' "claims [were] sufficiently pleaded to warrant at least discovery and perhaps trial" (Pet. 15a). Thus, the Second Circuit correctly applied the well-established rule of Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that a complaint should not be dismissed

unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" (Pet. 19a).

Noting that scienter "need not be pleaded with 'great specificity'" (Pet. 29a, quoting Connecticut National Bank v. Fluor Corp., 808 F.2d 957, 962 (2d Cir. 1987)), and that either allegations of motive and opportunity or reckless or conscious behavior are sufficient (Pet. 29a-30a, citing Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988), overruled on other grounds by United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc)), the decision below concluded that:

> [I]t is not clear, at least at this threshold stage of the lawsuit, that the defendants had nothing to gain by playing up strategic alliances while simultaneously keeping secret until the last moment the alleged active consideration of the rights offering.

(Pet. 30a-31a) (emphasis added).

The Second Circuit characterized petitioners' argument that they had nothing to gain by delaying disclosure of the rights offering as "strong on rhetoric but insufficient to preclude all possibility of developing proof that a motive in fact existed" (Pet. 31a)(emphasis added). Accordingly, the Second Circuit held that the district court had erred in determining on a Rule 12(b)(6) pleading motion, without the benefit of a factual record, that plaintiffs

could not prove a motive existed. That is all that was decided below, and, because of the fact dependency of questions regarding motive, is hardly worthy of this Court's attention at this point.

B. Plaintiffs' Allegations Of Defendants' Motive Cannot Be Dismissed At The Pleading Stage

The Second Circuit correctly declined petitioners' invitation to exceed the appropriate bounds of an inquiry on a Rule 12(b)(6) motion to dismiss. Thus, it refused to make the factual finding that petitioners had nothing to gain by delaying disclosure of the rights offering until the registration statement was filed. The court below concluded that "[w]ith all inferences drawn in favor of the plaintiffs" (Pet. 31a),

it was arguable, as plaintiffs' had alleged, that defendants concealed their consideration of the rights offering in order to maintain Time Warner's elevated stock price. This, in turn, would permit defendants "to raise the needed capital at a higher rights offering price, thereby issuing fewer shares and lessening the dilutive effect (or raising more capital by issuing the same number of shares)" (Pet. 32a).[5]

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[5] This was one of two motive theories proffered by plaintiffs. Although the decision below acknowledged that plaintiffs had put forward another theory of defendants' motive -- that defendants were motivated to conceal the fact that strategic alliance negotiations had been unsuccessful and that a rights offering was being considered in order "to avoid jeopardizing talks with prospective partners" (Pet. 30a) -- it did not address the validity of this theory. The dissent dismissed this alternative motive theory as "implausible" (Pet. 38a), an inappropriate use of the summary judgment standard on a Rule 12(b)(6) motion to dismiss. See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 595-598 (1986) (holding

(continued...)

The court below correctly disregarded as irrelevant to plaintiffs' motive allegations petitioners' contention that, upon announcement of the rights offering, the efficient market necessarily would have operated to prevent them from succeeding in raising capital at a higher offering price. The Second Circuit stated that:

> In a case like the pending one . . . the issue is not whether the misleading aspect of the prior statement in fact lingered; it is only whether the plaintiffs can show that the defendants had a motive not to promptly correct the misleading aspect of the prior statement.

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[5](...continued)
on a motion for summary judgment that defendant had no plausible motive for entering into antitrust conspiracy). Whatever relevance an "implausibility" standard may have on a motion for summary judgment, it has none on a motion under Rule 12(b)(6), which requires that the legal insufficiency of the complaint be established "beyond doubt." Conley v. Gibson, 355 U.S. at 45-46.

> Whether such a motive existed depends not on what any member of this panel believes, but on what the plaintiffs can prove.

(Pet. 33a).

This motive theory does not "def[y] common sense" as the dissent below suggests (Pet. 39a), nor will it encourage "a flood of 10b-5 strike suits on far-fetched theories" as petitioners speculate (Pet. 7). Indeed, that defendants could have been motivated to delay disclosure of the rights offering for the reason endorsed by the Second Circuit comports with common sense, and, as noted below, is entirely consistent with the efficient market theory. In all events, however, the question of motive is decidedly <u>factual</u> in nature and ordinarily not susceptible to judicial determination on a pleading

motion under Rule 12(b)(6). See, e.g., Arlington v. Merrill, Lynch, Pierce, Fenner & Smith, 651 F.2d 615, 619 (9th Cir. 1981); Holmes v. Bateson, 583 F.2d 542, 552 (1st Cir. 1978).

Under the variable-price rights offering that was announced on June 6, 1991, if all existing shareholders exercised their rights, each would receive a single additional share of Time Warner common stock for $105. This was an attractive discount from Time Warner's closing stock price of $119 per share on June 3, 1991, three days before the rights offering was announced. The company's common stock had risen steadily to this level from $86 per share in December 1990, in tandem with defendants'

statements "hyping" strategic alliances.

Defendants knew that if they disclosed that the rights offering was under consideration prior to the date the registration statement was filed, the price of Time Warner's common stock would have fallen precipitously.[6] Instead, defendants' silence allowed them to take advantage of the inflated market price of Time Warner's common shares by announcing the rights offering at a time when the stock was trading at more than $105 per share and structuring the rights offering in such a way as to coerce existing

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[6] Indeed, the price of Time Warner common stock dropped in the days immediately preceding the announcement undoubtedly because the news that a rights offering was under serious consideration had leaked to some investors.

shareholders to purchase shares on the offering at prices of up to $105 per share. As the dissent below acknowledged:

> If all shareholders exercised their rights, each would purchase one new share for $105. If only 60% exercised the rights, those shareholders would purchase 1-2/3 shares for $63. As the complaints allege, therefore, the offering was coercive because shareholders hoping to minimize their losses would feel compelled to come up with fresh money. Unlike an infusion of capital from outside that would dilute but also benefit shareholders, this new issue of equity would necessarily lessen the value of the common shares because existing shareholders had either to put up more money or to incur a disproportionate loss in value.

(Pet. 38a) (emphasis added).

Quite simply, defendants would not have been able to set the exercise price of the variable-price rights offering at $105 per share if

prior disclosure that the rights offering was being considered had driven the price of Time Warner's shares down to the $90 per share range that it had been trading in prior to defendants' public "hyping" of strategic alliances. Thus, the Second Circuit correctly found that defendants could derive economic advantage by withholding disclosure of the rights plan in order to maintain an inflated price for the company's shares and that plaintiffs should have an opportunity to prove that this was true. This was all that was necessary on a Rule 12(b)(6) motion to dismiss.

C. The Motive Theory Accepted By The Decision Below Is Not Contrary To The Efficient Market Theory Underlying This Court's Decision In Basic, Inc. v. Levinson

The decision below does not threaten the validity of the efficient market hypothesis underlying this Court's decision in Basic, Inc. v. Levinson, 485 U.S. at 241-51, despite petitioner's protestations to the contrary. Thus, while dramatic, petitioners' claim that the Second Circuit's decision merits review by this Court because they speculate it would cause untold havoc and uncertainty in the securities markets (Pet. 15-16), is completely meritless.

The Second Circuit recognized that the market reflects negative

information when disclosure is proper. However, here the disclosure itself was coercive and manipulative in that the market was given no opportunity to assimilate independently the unavailability of strategic alliances or that Time Warner was considering alternate means of raising equity capital prior to the announcement of the unique and coercive rights offering. The Second Circuit merely concluded that in this case defendants could have believed or hoped that their conduct would result in Time Warner being able to succeed in effecting a rights offering at a higher level than had they disclosed consideration of the offering in early May.

In Basic, this Court held that the efficient market theory

gives rise to a presumption of reliance by the purchaser. However, this does not mean that given an efficient market, allegations of a defendant's scienter can be disproved as a matter of law on a motion to dismiss merely by assuming that the market will ultimately and efficiently reflect statements not yet made by defendants to correct their wrongful withholding of material information. This proposition offers no protection to the unsuspecting investor who purchases shares during the period defendants are withholding information.

It was not until the novel, complex variable rights offering proposal was rejected as coercive by the SEC that the market was able to

adjust and reflect the true value of Time Warner given the failure of defendants' search for strategic partners. Indeed, it cannot be ignored that the exercise price in the rights offering that finally was achieved was $80 per share -- far less than the $105 per share defendants were trying to extract from shareholders in the original variable-price rights offering proposal. Thus, petitioners' assertion that the decision below is at odds with this Court's decision in Basic is fallacious and simply represents an attempt to fabricate an issue worthy of review. On inspection, what is revealed is a fact issue that requires determination by the district court, and nothing more.

II.

THE DECISION BELOW DOES NOT CREATE A SPLIT AMONG THE CIRCUITS WITH RESPECT TO THE EFFICIENT MARKET THEORY

There also is no merit to petitioners' argument that the decision below creates a conflict with other circuits because it precludes a defendant from using the efficient market theory to counter plaintiffs' allegations of scienter while allowing plaintiffs to plead the market's efficiency in order to invoke the fraud-on-the-market doctrine's presumption of reliance. Petitioners claim that both the Fourth and the Seventh Circuits have "rejected such one-sided use of Basic's efficient market doctrine" (Pet. 13).

The decision below does not, as petitioners contend, permit plaintiffs to "plead the efficient market theory as a sword," while denying defendants the opportunity to use it "as a shield." Petitioners' argument mixes apples and oranges in an effort to manufacture a split among the circuits. The decision below merely held that in this case, the efficiency of the market did not establish as a matter of law that defendants were not motivated as plaintiffs had alleged. Defendants are not precluded from making this fact intensive argument at an appropriate stage in this litigation.

Thus, the decision below does not conflict with the decisions of the Fourth and Seventh Circuits in Raab v. General Physics Corp., 4 F.3d

286 (4th Cir. 1993), and Roots Partnership v. Land's End, Inc., 965 F.2d 1411 (7th Cir. 1992). Those decisions are completely distinguishable from this case on their facts. In Raab, contrary to petitioners' assertion that the press release corrected "previous misrepresentations" in the annual report, the press release and the annual report were issued on the same day. Raab, 4 F.3d at 289. In Roots Partnership, plaintiffs purchased months after the defendant had announced actual results which had the effect of correcting allegedly fraudulent predictions. Thus, the Seventh Circuit correctly held that plaintiffs could not claim that they had relied on the already discredited projections.

Unlike Raab and Roots Partnership, in this case, the market was completely unaware of defendants' consideration of the coercive rights offering during the weeks preceding its first public announcement on June 6. Thus, unlike the defendants in Raab and Roots Partnership, defendants in this case cannot plausibly argue -- much less establish beyond doubt on a Rule 12(b)(6) motion -- that information concerning the coercive rights offering credibly entered the marketplace during the class period thereby negating the inflationary effects of their statements "hyping" strategic alliances.[7]

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[7] Petitioners also posit that the Second Circuit's decision is inconsistent with certain SEC disclosure regulations (continued...)

III.

REVIEW BY THIS COURT IS NOT WARRANTED SINCE THE DECISION BELOW DETERMINED THAT PLAINTIFFS MAY BE ABLE TO PLEAD SCIENTER UNDER THE CONSCIOUS OR RECKLESS BEHAVIOR APPROACH

In addition to the fact that the decision below did not create a split among the circuits on any significant proposition of securities law, there is an alternative reason why this case does not merit review by this Court. The Second Circuit

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[7](...continued)
which, they contend, assume and depend on the market's efficiency. In so arguing, defendants again seek to foster the illusion that the Second Circuit somehow "eroded" the efficient market theory as endorsed by this Court in Basic. As discussed above, the Second Circuit actually embraced the efficient market theory in finding sufficient indicia of motive for purposes of a Rule 12(b)(6) motion; thus, the court's decision neither conflicts with nor undermines the SEC's disclosure requirements, notwithstanding petitioners' contentions to the contrary. As before, petitioners are simply fabricating unfounded conflicts in an attempt to manufacture arguments that are otherwise unworthy of this Court's attention.

noted that plaintiffs had proposed amending their complaint to supplement their allegations of conscious or reckless behavior by defendants and observed that "this amendment may well be adequate" (Pet. 34a). The decision below left it to the district court "to determine whether to allow plaintiffs the opportunity to amend their complaint so as to support an additional theory of scienter, and, if this opportunity is provided, to determine in the first instance whether such a theory is adequate" (Pet. 34a-35a). Given the procedural posture of this case, review by this Court would be premature since plaintiffs may amend their complaint to assert an alternative theory of scienter.

CONCLUSION

For all the reasons demonstrated above, the Court should not grant the petition for a writ of certiorari.

Dated: February 23, 1994

Respectfully submitted,

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